No. 7343

IN THE

United States Circuit Court of Appeals

For The NINTH CIRCUIT

SOUTHERN PACIFIC COMPANY,
Defendant and Appellant,

vs.

F. J. BAFFERT and A. S. LEON, co-partners, trading under the firm name of Baffert & Leon,
Plaintiffs and Appellees.

SOUTHERN PACIFIC COMPANY, et al.,
Defendants and Appellants,

vs.

WHEELER-PERRY COMPANY,
Plaintiff and Appellee.

BRIEF FOR APPELLEES.

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THE MANUFACTURING STATIONERS INC. PHOENIX, ARIZONA

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BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

The appellee will adopt in this brief the plan of the appellants, of designating the parties in the same manner as in the Trial Court.

In most respects the Statement of the Case appearing

in the brief of the defendants (pp. 1-11) is correct. There are, however, certain omissions and errors therein which should be called to the court's attention. They are briefly as follows:

The defendants refer to the decision of the Interstate Commerce Commission in,

> *Traffic Bureau, et al. v. A. T. & S. F. Ry. Co., et al.*, (1928), 140 I. C. C., 171 (R. 8-36),

as the "Third Phoenix Case". This was proper in the *Arizona Grocery Case* (49 Fed. (2) 563· affirmed 284 U. S. 370), where we were dealing with Phoenix rates. The reference is not appropriate here, however; we are now dealing with shipments to Tucson. This decision deals with rates to many destinations in Arizona (R. 8-36); and rates to Phoenix in no manner were singled out or was Phoenix dealt with as the principal or key point in arriving at what were reasonable rates, either for purposes of reparation or for the future. In other words, the decision deals with rates to Tucson and other points as much as to Phoenix. It would be more accurate and appropriate in the instant case to refer to it as the "Tucson Case".

We shall therefore, so as to avoid misleading the court as to the true effect of this decision, refer to it as the "Tucson Case".

On page 5 of their brief defendants refer to the Commission's decision in *Docket 6806, Arizona Corporation Commission v. A. T. & S. F. Ry. Co., et al, 34 I. C. C. 158.* Because of the importance which will attach to the date of this decision, we wish at this time to call the court's

attention to the fact that it was decided May 25, 1915, (R. 128). The order in this case was also issued May 25, 1915, (R. 136). It became effective August 15, 1915, (R. 136-137), and specifically provided that it would "continue in force for a period of not less than two years from the date" when it took effect, i. e. until August 15, 1917. (R.137).

Finally the defendants attempt at page 10 to set forth plaintiffs' position in the trial court. Some omissions are made in this regard, and we shall therefore set them forth in full. Plaintiffs contended:

1. That the Commission in *Docket 6806* did not prescribe for the future the reasonable rates on sugar to Tucson; but

2. That even if the Commission had in this decision prescribed or approved the rates to Tucson, the effectiveness of that decision had been destroyed long before the decision of the Commission in the *Tucson Case* (140 I. C. C. 171), for two reasons: (a) the force and effect of *Docket 6806* and the order therein made expired August 15, 1917, two years after it became effective; and (b) because the subsequent changes in the rates destroyed the force and effect of the Commission's earlier approval. Thus the rates charged the plaintiffs were subject to reparation awards;

3. That the Commission's findings and awards with respect to reparation in the instant cases were jurisdictionally made and therefore valid;

4. That the findings and orders of the Commission in

the *Tucson Case* constitute *prima facie* evidence of the unreasonableness of the rates charged, and of the fact and amounts of the damage alleged to have been incurred by plaintiffs, and of the other facts and findings therein set forth;

5. That this *prima facie* showing was further supported by other testimony introduced by plaintiffs;

6. That the defendants failed to overcome the *prima facie* case of plaintiffs; and

7. That plaintiffs were entitled to judgments in accordance with the prayers of their complaints.

Otherwise than as above set forth the statement of the case submitted by defendants is correct.

BRIEF OF ARGUMENT.

I.

THE AWARDS OF THE COMMISSION UPON WHICH THE PRESENT CASES ARE BASED ARE VALID, AND THE COMMISSION POSSESSED JURISDICTION TO MAKE THE SAME.

1. The effectiveness of Docket 6806, decided by the Commission in 1915, and the Order therein made, expired in 1917.

The effectiveness of the decision in *Docket 6806* expired in 1917, under the provisions of the Commerce Act then in force.

> *Act to Regulate Commerce,* Sec. 15 (1 and 2); 34 Stat. L. 584; 41 Stat. L. 484, prior to amendment of February 28, 1920.

The Commission's order in *Docket 6806,* by referring

to the report and findings, made them a part of the order itself.

Arizona Wholesale Gro. Co. v. S. P. Co., 68 Fed. (2), 601.

The Commission can only act legislatively by formal order.

C. B. & Q. R. R. Co. v. Merriam and Millard Co., 297 Fed. 1;
American Sugar Rfg. Co. v. Del. L. & W. R. Co., 207 Fed. 733;
Brady v. I. C. C., 43 Fed. (2), 847, aff. 283 U. S. 804; 49 U. S. C. A., Sec. 15 (1).

It is the Commission's orders, not its reports and findings, which establish rates for the future; and it is the order, not the findings, which makes such rates conclusively just and reasonable, and free from reparation awards.

U. S. v. Atl., B. & C. R. Co., 282 U. S. 522; 75 L. ed. 513;
A. T. & S. F. Ry. Co. v. Arizona Gro. Co., 49 Fed. (2), 563; affd:
Arizona Gro. Co. v. A. T. & S. F. Ry. Co., 284 U. S. 370;
Eagle Cotton Oil Co. v. So. Ry. Co., 51 Fed. (2) 443.

Cases cited by defendants do not sustain their position, but on the contrary these cases all point out that the Commission can only act and give effect to its findings through orders.

Am. Sugar Ref. Co. v. D. L. & W. R. Co., 207 Fed. 733;
C. B. & Q. R. Co. v. Merriam, 297 Fed. 1;

U. S. v. A. B. & C. R. Co., 282 U. S. 522;
Western Paper Makers' Chem. Co. v. United States, 271 U. S. 268;
Vir. R. Co. v. United States, 272 U. S. 658;
S. P. Term Co. v. I. C. C., 219 U. S. 498;
Brady v. I. C. C., 43 Fed. (2) 847; affd: 283 U. S. 804.

2. Changes made subsequently in the rates found not unreasonable in Docket 6806 destroyed any Commission-made (or approved) character which such rates theretofore might have possessed.

The first increase of 25% in the rates found not unreasonable in *Docket 6806* was made by order of the Director General.

History of Rates, see Record, p. 200.

The Director General's order was not equivalent to an order of the Commission. In fact such order was carrier-made in character and subject to examination and change by the Commission.

Sec. 10, *Federal Control Act*, 40 Stat., 456;
No. Pac. Ry. Co. v. No. Dak., 250 U. S. 135;
Mo. Pac. R. Co. v. Ault, 256 U. S. 554.

The Director General's order No. 28 should be treated as if it was action taken by a carrier subject to the Act. This being true, the rate thereafter became carrier-made, and subject to reparation.

Dir. Gen. v. Viscose, 254 U. S. 498;
A. T. & S. F. Ry. Co. v. Arizona Gro. Co., 49 Fed. (2), 563.

3. Summary of Part I of Argument.

The Commission has jurisdiction as the administrative tribunal created by the Commerce Act to find that rates which have been charged by railroads for the interstate transportation of property in the past have been unreasonable or otherwise unlawful, and to make awards of reparations to shippers for the exaction of charges on their past shipments under such unlawful rates.

Sec. 8, Sec. 9; Sec. 13 (1), and Sec. 16 (1), 49 U. S. C. A.

T. P. Ry. Co., v. Abilene Cotton Oil Co., 204 U. S. 426; 51 L. ed. 553;

L. & N. R. Co. v. Sloss Sheffield Iron Co., 269 U. S. 217; 70 L. ed. 242;

Mills v. Lehigh Valley R. R. Co., 283 U. S. 473; 59 L. ed. 1415;

Meeker v. Lehigh Valley R. R. Co., 236 U. S. 412; 59 L. ed. 645.

The rates charged on shipments involved in the instant cases were not rates which had been fixed or approved by the Commission as just and reasonable. Being carrier-made, the Commission's awards of reparations are valid and should be enforced.

Arizona Gro. Co. v. A. T. & S. F. Ry. Co., 284 U. S. 370, 390.

II.

THE TRIAL COURT IN THE INSTANT CASES FOUND THE RATES CHARGED PLAINTIFFS WERE UNREASONABLE AND THAT PLAINTIFFS ARE ENTITLED TO RECOVER REPARATIONS FROM THE DEFENDANTS. THIS DECISION OF THE TRIAL COURT SHOULD BE APPROVED.

1. **The Commission's determination of the unreasonableness of the rates charged was conclusive on the Trial Court.**

When the Commission in *Docket 16742*, determined that the rates charged plaintiffs were unreasonable, this became conclusive on the Trial Court in the present cases.

So. Car. Asparagus Growers Assn. v. So. Ry. Co., 64 Fed. (2) 419.
Glenn Falls Portland Cem. Co. v. D. & H. Co., 66 Fed. (2) 490.

Any other rule would destroy the principle of uniformity of rates required under the Act.

Mitchell Coal & Coke Co. v. P. R. Co. 230 U. S. 247;
Baltimore & O. R. Co. v. Brady, 288 U. S. 448.

The proof on the questions of the fact, and amount of damage to plaintiffs, was clear, convincing and undisputed.

Record, 124-125, and 37, 41, 49, 50 and 53.

2. **Whether a rate is reasonable or unreasonable is a question of fact. The report and findings in Traffic Bureau, et al, v. A. T. & S. F. Ry. Co., 140 I. C. C. 171, and the awards of reparation made in favor of the Plaintiffs constituted a prima facie case before the Trial Court, which the defendants failed to overcome. The decisions of the Trial Court being supported by substantial evidence, are therefore conclusive on appeal as to this question of fact.**

Whether a rate is reasonable or unreasonable is a question of fact, not one of law.

Ill. Cent. R. R. Co. v. I. C. C. 206 U. S. 441;
T. P. R. Co. v. I. C. C. 162 U. S. 197;
Cin. N. O. & T. R. Co. v. I. C. C., 162 U. S. 184.

Where actions are tried by the court without a jury, the judgments of the Trial Court, if supported by substantial evidence, are conclusive on appeal; and the evidence must be considered in a light most favorable to appellees.

United States v. Linde, 71 Fed. (2), 925;
Victor Talking Machine Co. v. George, 69 Fed. (2), 871.
Mandel Bros. v. Henry A. O'Neil, Inc. 69 Fed. (2), 452;
Aberly v. Craven Co., 70 Fed. (2), 52;
Bayless v. Gage, 69 Fed. (2), 269;
Kurecki v. Buck, 71 Fed. (2), 227.

The evidence introduced in support of plaintiff's complaints is substantial, and ample to support Trial Court's findings and conclusions.

Traffic Bureau v. A. T. & S. F. Ry. Co., 140 I. C. C. 171.

Record, pp. 123, 124, 125, 214, 218, 220, 223.

Report, findings and awards, in *Docket 6806* were "prima facie evidence of the facts therein stated."

49 U. S. C. A., Sec. 16 (2).

Partial invalidity of *Docket 16742* as to Phoenix, Clarkdale, and Globe, did not destroy its validity to other points under consideration.

Spiller v. A. T. & S. F. Ry. Co., 253 U. S. 117, 132.

Comparison of rates to Phoenix or other points was not conclusive upon Trial Court in determining unreasonableness of rates on shipments in question.

Advances in Rates, Western Case, 20 I. C. C., 307, 309.
I. C. C. v. Chicago Gr. R. Co., 141 Fed. 1003, 1008. Aff: 209 U. S. 108;
City Coal Co. v. New York, 123 I. C. C. 609;
Dallas Paper Co. v. T. & N. R. Co., 132 I. C. C. 59;
Peabody Lbr. Co. v. Penn. R. Co., 132 I. C. C. 741;
Railway Exp. Agency v. United States, 6 Fed Supp. 249;
Traffic Bureau v. A. T. & S. F. Ry. Co., 140 I. C. C. 171.

The defendants having failed to introduce the evidence presented to the Commission in *Docket 16742*, such findings are conclusive and cannot be assailed upon appeal.

Miss. Val. Barge Co. v. United States, decided April 30, 1934, 290 U. S. .....

As previously stated, the only question with which this court can be concerned is whether there was any substantial evidence to support the findings of the trial court.

Kurecki v. Buck, 71 Fed. (2), 227, 229;
United States v. Alger (C. C. A. 9th), 68 Fed. (2), 592, 593;
So. Ry. Co. v. Blue Ridge Power Co., 30 Fed. (2), 33, 40;
United States v. Dudley, 64 Fed. (2), 743.

3. The question of discrimination is not properly before this court, and in any event is not an issue that can be raised by defendants.

The defendants having failed to assign as error the matter of discrimination, it is not before this court for review.

Louie Share Gan v. White, 258 Fed. 798;
Wight, et al, v. Washoe Co., 251 Fed. 819.

Behn Meyer Co. v. Campbell, et al, 205 U. S., 403.

The question of prejudice and discrimination is not one that can be raised or complained of by defendant carriers.

I. C. C. v. Chicago, R. I. & P. Ry. Co., et al, 218 U. S., 88, 109.

4. No error occurred in the introduction of evidence before the Trial Court.

The Trial Court has wide discretion in the matter of the order of introduction of evidence, and in the absence of manifest abuse of this discretion, its ruling will not be disturbed.

Sec. 3808, Rev. Stat. Arizona, 1928.
De Mund v. Benson, 265 Pac. 84 (Arizona).
24 Cal. Jur. 764.

The fact that some evidence conflicts with other evidence does not make it incompetent. The weight and credibility of witness is a question to be passed upon by the Trial Court.

Cyc. on Fed. Procedure, vol. 2, 709.

In any event, erroneous admission of evidence in cases tried by a court sitting without a jury is not grounds for reversal, especially where there is sufficient competent evidence to sustain its findings.

South Fork Brewing Co. v. United States, 1 Fed. (2), 167; cert den. 266 U. S. 626.
Cascaden v. Bell, 257 Fed., 926;
Lackner v. McKechney, 2 Fed. (2), 516;
Hall v. United States, 267 Fed., 795;
Gardner v. United States, 71 Fed. (2), 63 (9th C. C. A.).

There was sufficient evidence before the *Trial Court* to sustain its findings and decisions.

Docket 16742, Record 123, 124.
Awards of Reparation, Record 40-41 and 52-53.

III.

CONCLUSION.

ARGUMENT.

FOREWORD.

Although defendants assert several Assignments of Error (Defendants' Brief, pp. 11-14), and their brief in support thereof deals with many contentions and alleged errors of the trial court, nevertheless the entire argument of defendants can be summarized under two major headings:

First, that the rates charged plaintiffs on their shipments upon which reparation was allowed, were conclusively just and reasonable by reason of a decision of the Interstate Commerce Commission, decided May 25, 1915, appearing in *34 I. C. C. 158,* and known as *Docket 6806,* and therefore the reparation awards to plaintiffs are unlawful by reason of the *Arizona Grocery Case,* (284 U. S. 370), and the *Arizona Wholesale Case,* (68 Fed. (2), 601); and

Second, that if the Commission had authority to award reparation upon the shipments in question, the trial court erred in not rendering judgment for the defendants upon the evidence introduced at the trial of these cases.

This is summarized more or less in the same manner

by the defendants in their brief, in the foreword beginning at page 26, and in the conclusion to their argument beginning on page 97.

All of the points discussed by defendants fall under one or the other of these two main heads. While plaintiffs in this brief have not attempted to deal separately with each of the many subtopics of defendants' brief, all of the matters essential to the determination of these cases by the court are considered herein. We are certain the court will be convinced that no prejudicial error occurred at the trial of these cases, that the appeals should be dismissed, the findings of fact and conclusion of law of the District Court approved, and the judgments rendered thereon affirmed.

I.

THE AWARDS OF THE COMMISSION UPON WHICH THE PRESENT CASES ARE BASED ARE VALID, AND THE COMMISSION POSSESSED JURISDICTION TO MAKE THE SAME.

1. The effectiveness of Docket 6806, decided by the Commission in 1915, and the order therein made, expired in 1917.

Defendants labor hard from pages 29 to 36 inclusive of their brief, in order to show that the Commission *by its decision* in Docket 6806 (decided in May, 1915), approved the rates on sugar to Tucson, the destination here involved. For reasons elsewhere set forth in our brief, the effectiveness of this decision expired in 1917, and it is therefore immaterial whether the Commission in its decision approved such rates or not. In fact we shall later show that the more the Commission effectively passed

on them for future application (i. e. acted on such rates legislatively) the more effectively they expired in 1917, as Commission approved or prescribed rates. We shall, for this reason, not spend any time on this point.

There is one vital reason why *Docket 6806,* and the Order made therein, are not controlling in the present cases. Whatever force and effect they had upon the rates to Tucson expired in 1917; that is, two years after the order was made.

For the convenience of the court we set forth herewith the pertinent portions of the *Commerce Act* which were in effect at the time *Docket 6806* was decided and the order therein made:

> "Whenever, after full hearing of a complaint . . . the Commission shall be of opinion that any individual or joint rates or charges whatsoever demanded, charged, or collected by any common carrier or carriers subject to the provisions of this Act for the transportation of persons or property . . are unjust or unreasonably or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged . . , *and to make an order* that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds the same exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation . . in excess of the maximum rate or charge

so prescribed, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

"All orders of the Commission, except orders for the payment of money shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, *not exceeding two years,* as shall be prescribed in the order of the Commission, unless the same shall be suspended or modified or set aside by the Commission or be suspended or set aside by a court of competent jurisdiction." (Emphasis supplied)

Act to Regulate Commerce, Sec. 15 (1 and 2); 34 Stat. L. 584; 41 Stat. L. 484; prior to Amendment of February 28, 1920.

The amendment of 1920 removed the two-year limitation, and provided that all orders of the Commission should "continue in force until its further order, or for a specified time, according as shall be prescribed in the order", *49 U. S. C. A., 15 (2).* The decision of the Commission which fixed 96½c as the maximum rate to Phoenix, and which was involved in the *Arizona Grocery Case,* was decided *June 22, 1921,* (R. 138), more than a year after the amendment removing the two-year limitation had been passed.

It is therefore clear that *Docket 6806* and the *First Phoenix Case* are not analagous. The effectiveness of each must be considered in the light of the Act in force at the time each decision was rendered. This should be borne in mind throughout the entire argument which follows.

Defendants state that they do not rely upon the order in *Docket 6806;* that their defense is based upon the findings in that case.

In passing, and before showing that the cases of *Arizona Gro. Co. v. A. T. & S. F. Co., 284 U. S. 370,* hereinafter referred to as "Arizona Grocery Case", and *Arizona Wholesale Gro. Co. v. S. P. Co., 68 Fed. (2) 601,* hereinafter referred to as "Wholesale Grocery Case", make this position entirely untenable, let us examine the statement of the defendants:

> "It should be noted that defendants do not rely at all upon the *order* made in Docket 6806. Their defense is based upon the express *finding* there made by the Commission, particularly as that finding was addressed to the rate made effective, during the pendency of the case, to Tucson. The Commission's *order* in Docket 6806 (R. 136-137) related entirely to rates *for the future* to *Phoenix* and *Prescott,* neither of which points is involved as the destination of any of plaintiffs' shipments. While the order refers to and by such reference includes the opinion, the context makes it clear that this reference was merely for the purpose of affording proper support, through an express finding of fact, for the affirmative order respecting the future rates to Phoenix and Prescott. No affirmative *order* was made, dealing with the rates to Tucson; and the *finding* contained in the opinion, relating to the rates to that point, was therefore not an essential part of the order."
>
> (Appellant's brief, p. 48).

The order in Docket 6806 in this regard is identical with the order in the case of *Graham and Gila County*

Traffic Assn. v. Arizona Eastern R. Co., et al, 40 I. C. C. 573, considered by this court in the Wholesale Grocery Case (R. 136 and 137). There also, no *affirmative order* was made dealing with the reasonableness of sugar rates to Globe. In the Wholesale Grocery Case the shipper contended that no order had been made, no legislative action taken, on the question of sugar rates to Globe. The court, however, on this question said:

> "The appellant argues earnestly that the *order* in the Graham Case is silent as to the reasonableness of the rates to Globe, and that therefore the commission cannot be understood to have taken any 'legislative action on the question of reasonableness of rates for the future'. Two short answers may be made to this contention. First, the order in the Graham Case specifically, as we have seen, makes the report a part thereof; and in the report the question of unreasonableness is treated. Second, the Supreme Court, in the Arizona Grocery Case, has *recognized essential unity of a report and an order promulgated by the commission.*" (Emphasis supplied).
>
> 68 Fed. (2), 601, 609.

It is therefore apparent that the Wholesale Grocery Case established the principle that the Commission by such reference makes the report part of the order. It would seem to follow that when the order becomes inoperative, so likewise would the findings which have been made a part of it become inoperative.

The cases uniformly hold that the Interstate Commerce Commission can only act legislatively by formal order.

Chicago, B. & Q. R. R. Co. v. Merrian & Millard Co., 297 Fed. 1.

In this case the Court, on page 4, said:

> "Section 15 of the Interstate Commerce Act (Comp. St. Par. 8583) required that any change of the rates made by the Commission should be made, not by a report, finding, or opinion, but by an order to the carrier to cease and desist from collection of the rate, to take effect not less than thirty days after the date of the order."

Also,

American Sugar Rfg. Co. v. Delaware L. & W. R. Co., 207 Fed. 733; and
Brady v. I. C. C., 43 Fed. (2), 847, aff. 283 U. S. 804.

Both of the last cases are cited in Defendant's brief, p. 51.

See also the Act itself, Section 15 (1).

This is again made clear by a case cited by defendants on page 49 of their brief.

U. S. v. Atl. B. & C. R. Co., 282 U. S. 522, 75 L. ed. 513-518.

In this case the court said:

> "The action here complained of is not in form an order. It is part of a report—an opinion as distinguished from a mandate . . Such action is directory as distinguished from mandatory. No case has been found in which matter embodied in a report and not followed by a formal order has been held to be subject to judicial review."

It is utterly absurd for the defendants to insist that the Arizona Grocery Case sustains their contention in this regard, or that it in any degree overrides the *Eagle Cotton Case* (51 F. (2) 443). We appreciate that this court is entirely familiar with the decisions of this court and the Supreme Court in the *Arizona Grocery Case,* but at the expense of repetition we shall consider fully these decisions. In doing so we believe the court will have no difficulty in quickly disposing of the absurd position of defendants.

First let us look at the decision of this court. Judge Wilbur in rendering this decision, and in finding the rates of the carriers to be commission-made, dealt only with the "order" in the First Phoenix Case. This is clear from the following excerpts from that opinion:

> " . . fixed in its previous *order* as a just and reasonable rate",
>
> " . . . its *order* fixing a maximum rates was in legal effect a determination by the Commission in its administrative or quasi-legislative capacity",
>
> " . . . that the *order* of the Commission amounted to a decision that the rates fixed by the carriers below the maximum it had established were just and reasonable",
>
> "Otherwise, it would be absurd to provide that the carrier should thereafter be compelled to conform to the *order* of the Commission";
>
> "It is true that the original *order* is not res judicata, but its effect is quite as final, it is a legislative fiat;"
>
> "For where the rate is one *fixed* by law it is not excessive in any legal sense;"

" . . . rates *established by the legislative power,*"

and other similar references too numerous to mention.

This entire line of reasoning was followed by Justice Roberts in his opinion written in the Supreme Court. He considered at length the legislative history of the function of rate making by the Interstate Commerce Commission, pointing out that originally,

> "No authority was granted *to prescribe* rates to be charged in the future. Indeed after a *finding* that an existing rate was unreasonable the carrier might put into effect a new and slightly different rate and compel the shipper to resort to a new proceeding to have this declared unreasonable."
>
> 284 U. S. 370, at page 385.

That is, there could be no commission-made rate originally because no order pertaining to the future could be issued by the Commission. Continuing,

> "Under the Act of 1887, the Commission was without power either to *prescribe* a given rate thereafter to be charged, or to set a maximum rate for the future, for the reason that so to do *would be to exercise a legislative function not delegated to that body by the statute.*"
>
> "The Hepburn Act and the Transportation Act evince an enlarged and different policy on the part of Congress. The first granted the Commission power to fix the maximum reasonable rate; the second extended its authority to the prescription of a named rate, or the maximum or minimum, or maximum and minimum rate . . When under this mandate the Commission *declares* a specific rate to be reasonable and

lawful rate for the future *it speaks as the legislature,* and its pronouncement has the force of a statute." (Emphasis supplied).

284 U. S., at page 386.

It was by these two Acts, referred to by Justice Roberts, that the Commission was granted the power and authority to issue *orders* pertaining to the future. Without the power to issue an order the Commission's findings and reports had no effect for the future, and could not be considered legislative in character. It is therefore clear that the Commission can only act in its quasi-legislative capacity through an order. The *Arizona Grocery Case* and the *Wholesale Grocery Case* dealt only with the legislative power of the Commission in fixing rates. They were not concerned with the statutory requirement compelling the Commission to make reports and findings before making the order.

Looking again at Justice Robert's opinion, this is apparent:

> "The report, and order of 1921 involved in the present case declared in terms that 96.5 cents was, and for the future would be, a reasonable rate. *The legal rate thus established became by virtue of the Commission's order also a lawful, that is, a reasonable, rate.*" (Emphasis supplied). (Page 387).

It is "*by virtue of the Commission's order*", not by virtue of the report or findings, that a rate prescribed by the Commission becomes lawful. In other words, in the present cases, after the effectiveness of the order in Docket 6806 expired in 1917, (i. e. in two years) by virtue of the

Commerce Act then in effect, the rate or rates so prescribed or approved, either directly or by reference to the report, ceased to be any longer conclusively just and reasonable rates, and they were thereafter subject to reparation orders of the Commission.

The question here being discussed, it seems to us, is absolutely and finally decided by the following and concluding excerpts from Justice Robert's opinion:

> "The Commission's error arose from a failure to recognize that *when it prescribed* a maximum reasonable rate for the future it was performing a legislative function, and that when it was sitting to award reparation it was sitting for a purpose judicial in its nature. In the second capacity, while not bound by the rule of *res judicata,* it was bound to recognize the validity of the rule of conduct prescribed by it and not to repeal its own enactment with retroactive effect. *It could repeal the order as it affected future action,* and substitute a new rule of conduct as often as occasion might require, but this was obviously the limit of its power, as of that of the legislature itself."
>
> (Emphasis supplied). (Page 389.)

The plaintiff is at a loss to see how the defendant carriers get any solace whatsoever out of the *Arizona Grocery Company Case* on this phase of their argument. There is nothing in either the Circuit or the Supreme Court decisions substantiating their position; but quite the contrary, these decisions support the plaintiffs in their contentions that it is the order, not the findings, which make a rate conclusively just and reasonable, and free from subsequent reparation awards.

We submit that *Section 15 (1)* of the Act as it read prior to 1920, the *Eagle Case, (Eagle Cotton Oil Co. v. A. G. S. R. Co., 51 Fed. (2) 443, the Wholesale Grocery Case,* the *Arizona Grocery Case,* dispose entirely, completely and effectively of the argument of the defendant carriers that the Commission was without jurisdiction to make the awards upon which the instant suits are based.

The rates charged the plaintiffs were a part of (as Justice Roberts described them) "the great mass of rates" which are carrier-made rates, and "as to which the Commission may award reparation". The carriers have not had the temerity to suggest in these cases that they were bound under pain of penalty to comply with the report and order of the Commission in Docket 6806 after the expiration of the two years provided in the statutes. Not being longer bound by the report and order, and being free to fix their own rates on plaintiff's shipments, such rates became and remained carrier-made, not commission-made. The carriers would have the shippers bound by the findings although they *were not.* Their commission-made character expired in 1917, long before the plaintiffs' first shipments upon which reparation was awarded, moved. It is the order which gives the report and findings legislative effect. It is wholly illogical to insist, as do the defendants, that the findings remain effective although the order which makes them effective expired. No cases cited by defendants in their brief sustain such an absurd contention.

In discussing this point, the defendants urge that there is a difference between the Commission's orders and re-

port and findings. That can be readily admitted, but such distinction does not alter the correctness of the ruling in the *Eagle Cotton Oil Company Case* (51 Fed. (2) 443), holding that prior to 1920 a rate order of the Commission expired by limitation in two years. We believe all of the cases cited by the defendants establish the principle that the Commission can only act in a legislative manner, i. e., exercise its administrative functions concerning rates for the future by orders, not findings. See:

Amer. Sugar Ref. Co. v. D. L. & W. R. Co., 207 Fed. 733;
C. B. & O. R. Co., v. Merriman, 297 Fed 1;

both cited on page 52 of Appellants' brief; and

U. S. v. A. B. & C. R. Co., 282 U. S. 522;

cited on pages 49 and 50 of Appellants' brief. The last case goes so far as to say:

> "No case has been found in which matter embodied in a report and not followed by a formal *order* has been held to be subject to judicial review." (Page 527).

How, if the report and findings are not subject to judicial review, can they be said to establish rates? We hardly believe our opponents would care to establish the principle that the Commission might prescribe rates by findings which would not be subject to judicial review.

Other cases cited by defendants on this point do not sustain in any manner their position. For example, *Western Paper Makers' Chem. Co. v. U. S., 271 U. S. 268,* (cited page 55 of Appellants' brief). They quote an excerpt from this opinion dealing with findings of the Com-

mission, but the real question before the court was the order issued by the Commission after the findings had been made. This is apparent from the opening sentence of the opinion, which reads:

> "This suit . . was brought . . to enjoin in part, and to modify, certain *orders* of the Commission."

This case lends no support to the argument of the defendants, that it is the finding which establishes the rate. Quite the opposite, it shows that it is the Order which makes the findings effective.

To the same effect is another case, *Vir. R. Co. v. U. S., 272 U. S. 658,* cited on page 56 of their brief. The suit involved the order of the Commission, as evidenced by the following statement on page 662, by Justice Brandeis:

> "This suit was brought by the Virginian against the United States, the Interstate Commerce Commission, and the Chesapeake and Ohio, in the federal court for the Southern District of West Virginia, *to enjoin the enforcement of the Order and to set it aside.*" (Emphasis supplied).

If the findings of the Commission have the force and effect insisted upon by our opponents, why then are all these actions which are brought by other railroad carriers directed at the orders, not the findings? In fact, one of the cases cited by them, *U. S. v. A. B. and C. R. Co. (supra),* stated no action could be taken against the findings.

Not a single case cited by defendants in their brief holds that the Commission establishes rates by its findings; but on the contrary, they uniformly hold that rates

can only be established by the orders of the Commission.

An examination of Section 14 of the Transportation Act relied upon by defendants proves the error of their own contention. This section reads:

> "*Reports of investigations by Commission.* Whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, *together with its decision, order, or requirement in the premises;* and in case damages are awarded such report shall include the findings of fact on which the award is made."
>
> 49 U. S. C. A., Title 49, Sec. 14.

It is apparent from this section that Congress simply intended that no order be issued by the Commission as a result of an investigation without the Commission also making a report stating its conclusions, i. e., basis for its order. This court in the *Wholesale Grocery Case* recognized "*the essential unity* of a report and an order promulgated by the commission", and cited the decision of the Supreme Court in the *Arizona Grocery Company Case* as authority. (Page 609, 68 Fed. (2) 601). The argument of the defendants in the present cases ignores entirely this principle of unity.

The carriers cite *Southern Pacific Company v. Interstate Commerce Commission, 219 U. S. 433* (pages 53 and 54, Appellants' Brief), and state that one of the questions directly presented and passed upon in this case was whether the limitation applied to the Commission's findings as well as to its orders. *The question involved in*

this case is the validity of an order of the Commission. The portion of the opinion quoted by defendants sets forth the two reasons why the court did not consider the questions involved moot, although the two-year period had expired. These were:

First, the possible liability for reparation to which the railroads might be subjected if the legality of the order were not determined; and second, the influence and effect which the existence of *"the rate fixed for two years"*, if legal, would have upon the exercise by the railroads of *"their authority to fix just and reasonable rates in the future."* The second reason given by the court clearly points out that the rate is only Commission-made; that is, fixed by the Commission during the two-year term of the order; and that thereafter the rate is carrier-made, that is, fixed by the carriers. This is likewise true of another case cited, *S. P. Term. Co. v. I. C. C., 219 U. S. 498,* (page 54 of Appellants' Brief). Both of these cases just mentioned were dealing with the effect of the order, not the report and findings of the Commission. Nothing in either of these decisions holds that the rates fixed prior to 1920 by the Commission or the findings thereon are binding upon shipper or carrier after the expiration of the two-year period.

In the case of *Brady v. I. C. C., 43 Fed. (2) 847, affirmed in 283 U. S. 804,* cited and quoted from at length on pages 51 and 52 of Defendants' brief, the ineffectiveness of the findings of the Commission is clearly set forth. The court, among other things, said:

"An order of the Commission is analagous to the

judgment of a court, and it is well settled that the findings upon which a judgment is based constitute no part of the judgment itself even though incorporated in the same instrument. *The Judgment itself does not reside in its recitals but in the mandatory portions.* It has been expressly held that findings of the Commission embodied in its reports are not orders within the meaning of the statutes relating thereto." (Emphasis supplied).

We believe the analogy between a judgment and the Commission's orders is well stated. Certainly it is the decision—the mandatory portion of a judgment which is binding upon the parties and determines their respective rights—not the findings, as pointed out by this court.

So also, it is the order of the Commission, not the findings, which establishes or approves the rates for the future. The order in Docket 6806 having expired in 1917, the rates thereafter charged were no longer legislatively established or approved by the Commission. Nothing that the Commission had said or done in the case was any longer controlling as to the rates thereafter charged by the defendant carriers. This being true, the *Arizona Grocery Case* does not apply, and the Commission was free to grant reparations on shipments moving subsequent to the expiration date of the Order.

2. Changes made subsequently in the rates found not unreasonable in Docket 6806 destroyed any Commission-made (or approved) character which such rates theretofore might have possessed.

Defendants urge that although the rates charged plaintiffs on the shipments in question were higher than those

found not unreasonable in *Docket 6806,* the rates nevertheless remained commission-made (or approved) because the subsequent changes were authorized (Appellants' Brief, p. 37).

The rates found not unreasonable in Docket 6806 in 1915 to Tucson were 60c minimum weight 36,000 lbs. and 55c minimum weight 60,000 lbs., both from Los Angeles, California, and San Francisco, California. (R. 132). The rates charged plaintiffs on shipments involved in these cases were 84c and 86½c (all such shipments exceeding 60,000 lbs.) (R. 49 and 50). The rates prescribed by the Commission as reasonable on shipments for the reparation period were 73c and 77c (R. 37, 49 and 50). The rates charged were therefore considerably higher than the rates found not unreasonable in Docket 6806.

As above stated, defendants' attempt to explain this on the ground that the rates set forth in Docket 6806 were later changed or modified by authorized general changes (Appellants' Brief, p. 37).

The defendants will undoubtedly admit that at no time between the date of the decision in Docket 6806 and the dates of shipments here in question was the Commission called upon to consider the reasonableness of sugar rates to Tucson. But the defendants insist that these rates were changed either by the Director General of Railroads as head of the United States Railroad Administration, or in accordance with adjustments made in the general level of all rates, and they therefore remained commission-made.

This line of reasoning ignores entirely the law applicable, and the holding of many decisions hereinafter considered.

In the case of *Brimstone R. R. and Canal Co. v. U. S., 276 U. S. 104, at page 122,* 72 L. ed. 487, at 494, the Supreme Court said:

> "The general findings and permission of Ex Parte 74 and Matter of Reduced Rates did not approve of or fix any particular rate . . . Neither case approved 'any specific rate as reasonable in itself or as properly adjusted with respect to other rates nor did it justify in advance any rate which might be published as a result thereof'. In them the Commission was dealing with the whole body of rates throughout the country—were looking at the general level of all rates; and the propriety of the rates to which the Brimstone Company was party was not the subject of particular investigation or consideration."

The Supreme Court in that case cited with approval among other decisions of the Commission, S. and T. Co. v. *Director General, 61 I. C. C. 526,* in which the Commission said that its "sanction of a general adjustment does not carry with it the approval of any particular rate."

The order of the Director General in 1918 likewise was dealing with all rates, and had no particular reference to any rates on sugar; besides it was not the equivalent of an order of the Commission; and the Commission, by *Section 10* of the Federal Control Act (*40 Stat., 456*) was given the power to "suspend or set it aside."

This section authorized the Director General to initiate

rates, fares and charges, by filing the same with the Interstate Commerce Commission. It further provided that:

> " Said rates, fares, charges, classifications, regulations, and practices *shall be reasonable and just*, and shall take effect at such time and upon such notice as he (Dir. Gen.) may direct, *but the Interstate Commerce Commission shall, upon complaint, enter upon a hearing concerning the justness and reasonableness* of so much of any order of the President as establishes or changes any rate, fare, charge, classification, regulation or practice of any carrier under Federal control, and may consider all the facts and circumstances existing at the time of the making of the same." (Emphasis supplied.)

The action of the Director General in his Order No. 28 relied upon by defendants can not therefore be considered as equivalent to an order by the Commission. The defendants do not contend that the order of the Director General increasing the rates here in question was reviewed or considered by the Commission, or that it in any manner received the Commission's approval. This increase, by virtue of the Director's General's Order No. 28 was not commission-made, or even commission-approved. The Commission had nothing to do with it. All this was pointed out in the *Eagle Cotton Oil Company* decision.

This relationship between the Commission and the Director General was also considered in two cases cited by defendants in their brief (p. 38).

Northern Pacific Ry. Co. v. North Dakota, 250 U. S. 135, 146; 63 L. ed. 897.

Mo. Pac. R. Co. v. Ault, 256 U. S. 554-563; 65 L. ed. 1087.

The court, in the last case cited said:

> "The government undertook, *as carrier,* to observe all existing laws."

In other words, the Director General's Order No. 28 was a carrier-made (not commission-made) increase.

That the Director General occupied practically the same position as the carriers in so far as rate making was concerned, is definitely settled in the case of

> *Director General v. Viscose Co.,* 254 U. S. 498; 65 L. ed. 372,

in which the court, at page 501, said:

> "The power to suspend classifications or regulations when issued by the President was taken away from the Interstate Commerce Commission by the 'Act to Provide for the Operation of Transportation Systems While Under Federal Control', etc., *but the power over them after hearing remained,* and the power to suspend was restored when "The Transportation Act, 1920", approved February 28, 1920, became effective. *The action of the Director General of Railroads, under consideration in this case, may, therefore, be treated as if it had been taken by a carrier* subject to the Act." (Emphasis supplied.)

While this case was dealing with an order of the Director General pertaining to classifications, the same power of the Commission to review changes in rates existed. See *Section* 10, *Federal Control Act,* (40 Stat., 456), quoted above.

Therefore any action of the Director General in Order No. 28 increasing the rates must *"be treated as if it had*

been taken by a carrier subject to the Act." That is, such increase was carrier-made in nature. This being true, the rate became carrier-made, and subject to subsequent reparation awards.

The defendants cite the decision of the District Court for Arizona in

El Paso & S. W. R. Co. v. Arizona Corporation Com., 51 Fed. (2), 573,

to sustain their contention on this point. What the court there held was that all intra-state rates in Arizona were by force of a state statute commission-made or approved, and that the carrier could not under this statute initiate any such rates; that such rates, being commission-made or approved, no reparation thereon could be allowed. No consideration was given to the effect of the Director General's Order No. 28.

Finally, the defendants insist that this court in the *Arizona Grocery Case* (49 Fed. (2), 563), reached the conclusion that the intervening general change of 1922 had not operated to deprive the rates of the commission-made status conferred upon them in 1921, and that the same reasoning applies in the present case. It must be remembered that the change in 1922 was a general reduction, not an increase, such as occurred twice in the present case, first under the order of the Director General, and second under Ex Parte 74. This court in considering the rates in the *Arizona Grocery Case,* and the effect of the reduction of 1922, said:

"The ascertainment of a maximum rate is in effect

a decision that any rate below that maximum is reasonable as to the shipper. There was no change in the *subsequent action of the Commission or of the carriers which affected the maximum;* and no change in the maximum by the Commission because the voluntary act of the carrier in *reducing* its rate to 86.5 made an order unnecessary. The nature of this blanket order of the Commission was considered by the Supreme Court in *Brimstone R. R. and Canal Co. v. U. S.*, 276 U. S. 104." (Emphasis supplied.)

49 *Fed.* (2), 563, at page 571.

This statement does not lead to the conclusion that an increase of rates by an order of the Director General (Director General Order No. 28), or by a general order of the Commission (Ex Parte 74), makes such increased rates conclusively just and reasonable, and free from reparation.

3. SUMMARY OF PART I OF BRIEF

Concluding this first portion of our brief, we feel that it is hardly necessary to point out that the Commission has jurisdiction, as the administrative tribunal created by the Commerce Act, to find that rates which have been charged by railroads for the interstate transportation of property in the past have been unreasonable or otherwise unlawful, and to make awards of reparations to shippers for the exaction of charges on past shipments under such unlawful rates. This jurisdictional power is created by the Act.

Sec. 8; Sec. 9; Sec. 13 (1); Sec. 16 (1); 49 U. S. C. A.

And is amply and fully sustained by the decisions of the Supreme Court.

Texas & P. Ry. Co. v. Abilene C. O. Co., 204 U. S. 426; 51 L. ed. 553;
L. & N. R. Co. v. Sloss-Sheffield Iron Co., 269 U. S. 217; 70 L. ed. 242;
Mills v. Lehigh Valley R. R. Co., 283 U. S. 473; 59 L. ed. 1415;
Meeker v. Lehigh Valley R. R. Co., 236 U. S. 412; 59 L. ed. 645.

We have previously shown that the rates charged on the shipments involved in the instant cases were not rates which had been fixed or approved by the Commission as just and reasonable, because the effectiveness of *Docket 6806* had expired in 1917, and in addition subsequent changes had destroyed any commission-made (or approved) character which such rates possessed long before the shipments involved in these cases were made.

Thus the rates charged plaintiffs during the period of reparation were carrier-made. It therefore follows that the Commission's awards of reparation in favor of the plaintiffs are valid and should be enforced.

Arizona Gro. Co. v. A. T. & S. F. Ry. Co., 284 U. S., 370, 390.

II.

THE TRIAL COURT IN THE INSTANT CASES FOUND THE RATES CHARGED PLAINTIFFS WERE UNREASONABLE, AND THAT PLAINTIFFS ARE ENTITLED TO RECOVER REPARATIONS FROM THE DEFENDANTS. THIS DECISION OF THE TRIAL COURT SHOULD BE APPROVED.

1. The Commission's determination of the unreasonableness of the rates charged was conclusive on the Trial Court.

Defendants correctly anticipated (as set forth on page 75 of their brief) that plaintiffs would urge that the Commission's determination in *Docket 16742* of the unreasonableness of the rates charged had to be taken as conclusive by the Trial Court, and also by this court.

Defendants in answer to this position of plaintiffs cite many cases, but none deal as directly with the issue presented as do the three cases referred to in defendants' brief, the effectiveness of which the defendants attempt to destroy. We have in mind:

So. Carolina Asparagus Growers Assn. v. So. Ry. Co., 64 Fed. (2) 419;
Glenn Falls Portland Cem. Co. v. D. & H. Co., 66 Fed. (2) 490;

both decided in 1933 by two different Circuit Courts of Appeal (2nd and 4th), and the decision of the Supreme Court of the United States in,

Mitchell Coal and Coke Co. v. P. R. Co., 230 U. S. 247; 57 L. ed. 1472.

The decisions of both of the Circuit Courts of Appeal are based upon the remarks of Justice Lamar in the *Mitchell Case* (supra). In order fully to appreciate the significance and logic of these remarks it is necessary to read a substantial portion of the decision in the *Mitchell Case*, particularly appearing on pages 255-260 of the official report. We shall not attempt in the limited space of this brief to repeat the reasons for the rule set forth in that decision, except to point out the unassailable logic that any rule which does not make the decision of the Commission

on the question of reasonableness conclusive in reparation cases will destroy the principle of uniformity of rates required under the Act. This reasoning led to the principle set forth by Justice Lamar on pages 257 and 258, that where the suit is based upon unreasonable charges

> * * * "the whole scope of the statute shows that it was intended that the Commission and not the courts should pass upon that administrative question," * * * "such orders, so far as they are administrative, are conclusive, whether they relate to past or present rates, and can be given general and uniform operation, since all shippers who have been or may be affected by the rate can take advantage of the ruling and avail themselves of the reparation order. They are quasi-judicial and only prima facie correct in so far as they determine the fact and amount of damage,—as to which, since it involves the payment of money and taking of property, the carrier is by Section 16 of the Act given its day in court and the right to a judicial hearing."

Defendants cite the recent case of *Baltimore and O. R. Co. v. Brady,* 288 U. S. 448, as authority for a different rule, but an analysis of this decision discloses that it also recognizes the necessity of the rule of uniformity so forcibly pointed out by Justice Lamar in the *Mitchell Case.* On pages 456 and 457 the court said:

> "Questions as to the reasonableness of rules and regulations (also as to rates) * * * are for the Commission.
>
> "The facts stated in the complaint clearly show that there was *no question in this case requiring the exercise of the Commission's administrative power.*

> "The decision does not concern the reasonableness or validity of the rule itself and *it has no tendency against uniformity or other purpose of the Act.*" (Emphasis supplied.)

The question early arose as to whether a shipper in seeking reparation should first be compelled to secure a finding of the Commission that the rates charged were unreasonable. There are provisions in Section 9 of the Act which would indicate the shipper might go directly into court and there prove that the rates charged were unreasonable, without a previous finding of the Commission. The Supreme Court of the United States held however, in the case of *Texas & P. R. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, that notwithstanding these provisions of Section 9, and in order to secure unformity of rates and to avoid preference and discrimination, it was necessary for the Commission to find the rates in question unreasonable. In passing upon this question the court, on page 446, said:

> "In other words, the difference between the two is that which, on the one hand, would arise from *destroying the uniformity of rates which it was the object of the statute to secure*, and, on the other, from enforcing of that equality which the statute commands."

Under the contention of defendants different courts and different juries would reach different conclusions as to the reasonableness of a rate. Uniformity of rates would be destroyed and preference and discrimination would exist.

We submit that this court should adopt a rule which

will result in uniformity of rates; in other words, the rule set forth in the *Mitchell Case,* requiring the administrative order of the Commission on the question of reasonableness to be taken as conclusive. Any other rule would tend to destroy the principle of uniformity of rates.

The fact and amount of damage to plaintiffs by reason of the assessment of the rates found unreasonable was not disputed by defendants. The proof on these questions was clear and convincing (R. 124-125; and 37, 41, 49, 50 and 53). No attempt was made to contradict the facts set forth in this evidence.

The finding of unreasonableness being conclusive on the Trial Court, the fact and amount of damage being undisputed, the District Court properly rendered judgments for plaintiffs.

2. **Whether a rate is reasonable or unreasonable is a question of fact. The report and findings in Traffic Bureau, et al v. A. T. & S. F. Ry. Co., 140 I. C. C. 171, and the awards of reparation made in favor of the plaintiff constituted a prima facie case before the Trial Court which the defendants failed to overcome. The decisions of the Trial Court, being supported by substantial evidence, they are therefore conclusive on appeal as to this question of fact.**

There are ample and conclusive reasons why the judgments in these cases should be affirmed, even if we accept the theory of defendants that all of the issues were before the District Court, including the question of unreasonableness of the rates charged.

Under this theory defendants assert that the trial in the District Court was de novo, and that the question of the reasonableness or unreasonableness of the rates involved

was before the court for determination. Defendants have, however, apparently lost sight of the fact that the question of whether a rate is reasonable or unreasonable is a question of fact, and not one of law.

Ill. Cent. R. R. Co. v. I. C. C., 206 U. S. 441; 51 L. ed. 1128;
T. P. R. Co. v. I. C. C. 162 U. S. 197; 40 L. ed. 940;
Cin., N. O. & T. R. Co. v. I. C. C., 162 U. S. 184; 40 L. ed. 935;

and many other cases to the same effect.

The District Court found that the freight charges assessed the plaintiffs on the shipments involved were unreasonable to the plaintiffs, and in violation of the Interstate Commerce Act. (Finding of Fact, R. 255). The present cases as stated in defendants' brief were tried to the court without a jury, jury having been waived. (R. 68 and 69).

Therefore, even under the theory of defendants, the sole question before this court is whether there was substantial evidence to support this finding. If so, then such findings should not be disturbed.

The rule in such cases is that on appeal the judgment of the trial court in an action tried before the court without a jury, is conclusive if supported by substantial evidence, and such evidence must be considered in a light most favorable to appellee.

U. S. v. Linde, 71 Fed. (2), 925;
Victor Talking Machine Co. v. George, 69 Fed. (2), 871;

Mandel Brothers v. Henry A. O'Neill, Inc., 69 Fed. (2), 452;
Aberly v. Craven County, 70 Fed. (2), 52;
Bayless v. Gage, 69 Fed. (2), 269;
Kurecki v. Buck, 71 Fed. (2), 227.

And many other cases too numerous to cite.

Let us examine the amount and character of the evidence introduced and considered by the court.

Plaintiffs introduced into evidence without objection on the part of the defendants the following:

(1) Copy of Opinion and Order of Interstate Commerce Commission in *Docket 16742* and associated cases. *Traffic Bureau v. A. T. & S. F. Ry. Co.*, 140 I. C. C. 171, (R. 123, 124).

(2) Copy of orders by Interstate Commerce Commission for payment of reparations to plaintiffs in these cases. (R. 40-41 and 52-53).

(3) Copy of certain statements (Rule V, Statements), showing shipments made to and received by plaintiffs upon which reparations allowed (R. 125, 37, 49 and 50).

After the introduction of defendants' testimony, plaintiff offered additional evidence, through the witness L. G. Rief (R. 218), who it was stipulated was qualified as an expert familiar with rates and tariffs, and competent to file exhibits showing such rates and tariffs. This witness stated he was rate expert for the Arizona Corporation Commission and had been so employed since 1925, and submitted a statement comparing rates prescribed for reparation purposes in the present cases with Memphis-

Southwestern Sugar rates and 120% of Memphis-Southwestern sugar rates, together with other information (R 218 and 220). This witness testified on cross examination that he believed that Arizona points were entitled to rates less than 120% of the Memphis-Southwestern scale but that this exhibit was based on statement of Commission in *Docket 16742,* that defendant carriers subscribed to a basis of rates from California to Arizona which is about 120% of rates for same distances under the Memphis-Southwestern scale (R. 223).

Mr. J. L. Fielding, a witness for defendants, stated under cross examination that Phoenix, Arizona, up to November 7, 1926, was on a branch line, that a rate might be reasonable to Phoenix, higher than to a point on the main line, and that prior to 1921 carriers charged higher rates to Phoenix than to main line points (R. 214); that Globe, Arizona, was on a branch line and was never on the main line of the Southern Pacific Railway; that Tucson has always been a main line point, that defendants' Exhibit "F" did not show reduction of rates as actually charged to Phoenix (R. 215); and that he did not know of any decision of the Interstate Commerce Commission since *Docket 6806* (decided May 1, 1915) which dealt specifically with rates to Tucson. (R. 214).

On the other hand defendants introduced none of the evidence introduced before the Interstate Commerce Commission in *Docket 16742,* and associated cases. Practically all of the evidence of defendants on the question of fact as to the reasonableness of the rates dealt with the history of rates to Tucson (R. 200 and 201), and with compari-

sons with rates to Phoenix, Globe and Safford (R. 202 and 203).

Regardless of defendants' assertions to the contrary, the findings in *Docket 16742* were "prima facie evidence of the facts therein stated." This is settled by the Commerce Act itself.

49 U. S. C. A., Sec. 16 (2).

These findings specifically stated that the Commission found that the rates to Tucson had been unreasonable to the extent that they exceeded 73 and 77 cents from the Southern and Northern California groups respectively (R. 26); and they further found that complainants (including these plaintiffs) had made shipments at rates found to have been unreasonable; that they paid and bore the charges thereon, and were damaged thereby to the amount of the difference between the charges paid and those which would have accrued at the rates found reasonable, and that they were entitled to reparation with interest. (R. 25-27). The reasons for these findings are also set forth at length in this report (R. 8-27 inc.). All this was before the court as *prima facie* evidence in support of plaintiffs' case; as was also the evidence of L. G. Reif and the evidence of witness Fielding above referred to.

Defendants have attempted to destroy the value of the findings in *Docket 16742* on the ground that the reparation awards to shippers at Phoenix, Clarkdale, Globe and Safford, were held invalid in the *Arizona Grocery Case*, the *Wholesale Grocery Case*, and *T. F. Miller case* (District Court). Their argument is unsound. In the case of *Spiller v. A. T. & S. F. R. Co.*, 253 U. S. 117, 64 L. ed 810,

the court was considering an award (including the findings thereon) which was partially invalid. On this point the court said:

> "If there be doubt whether it was sufficient to sustain each and every claim that was allowed, we are not now concerned with this; the ruling in question being the refusal of the trial court to treat the award as void in toto. This was not erroneous if, to any substantial extent, the award was legally valid. If a part only of the claims was unsupported by evidence, the request for an adverse ruling should have been directed to these." Page 132.

The findings in Docket 16742 dealt with many, in fact all, points in Arizona. While awards to Phoenix, Globe and Clarkdale, might have been invalid because of earlier decisions by the Commission, this should not be controlling on other points.

In a sense, under the contention of the defendant carriers, these cases very largely turn on whether or not the Interstate Commerce Commission, when it prescribed a rate to Phoenix in the First Phoenix Case, it did not also prescribe and fix all rates to all points in Arizona at the same time, although absolutely no mention is made of this fact in the First Phoenix Case; no evidence was introduced or any record made as to any rate except those to Phoenix; and no other rates to any other points in Arizona were under attack. The syllabus in the First Phoenix Case reads:

> "Rates on sugar in carloads from *California points to Phoenix, Arizona*, found unreasonable. Reasonable rates prescribed for the future. R. 138.

In the *Arizona Grocery Case,* the Supreme Court pointed out that the great mass of rates will continue to be carrier-made rates, and upon which the Commission may award reparation. Under the contention now being advanced by the defendants, practically all rates throughout the United States would be commission-made, simply because rates at some particular points have been fixed and prescribed by the Commission.

The defendants insist that a comparison of rates to Phoenix was conclusive on the court. No attempt was made to show that the rates prescribed by the Commission to Tucson for the periods of reparation were confiscatory. No evidence as to costs of operation for these hauls was introduced. The defendants would suggest that the comparison of rates is the sole factor in determining the reasonableness of rates. This is incorrect, and the carriers are aware of it.

Just a brief quotation from a report of the Commission itself:

> "The problem is difficult, the facts to be considered multitudinous and of an infinite variety of modifying conditions, from which the Commission, without applying any policy which runs counter to the power granted and the duty imposed upon it, seeks by "slow evolution" to develop a satisfactory system of rates."
>
> *Advances in Rates, Western Case,* 201 I. C. C., 307, 379.

There are many other statements of the Commission in many other decisions to the same effect.

One court has expressed it as follows:

"A careful examination of the opinions of that court (as well as the evidence taken in these cases) shows that there are a great many factors and circumstances to be considered in fixing a rate. Noyes, Am. R. R. Rates, pp. 61, et seq., 85-109. Among other things: (1) The value of the service to the shipper, including the value of the goods and the profit he could make out of them by shipment. This is considered an ideal method, when not interfered with by competition or other factors. It includes the theory so strenuously contended for by petitioners, the Commission, and its attorneys, of making the finished product carry a higher rate than the raw material. This method is considered practical, and is based on an idea similar to taxation. I. C. C. v. B. & O. Ry. Co. (C. C. 43 Fed. 37, 53; Noyes, Am. R. R. Rates, 53). (2) The cost of service to the carrier would be an ideal theory, but it is not practical. Such cost can be reached approximately, but not accurately enough to make this factor controlling. It is worthy of consideration, however. I. C. C. v. B. & O. Ry. Co., 43 Fed. 37, 3 I. C. C. 192; Ransome v. Eastern Counties Ry. Co. (1857), I. C. B. N. S. 437, 26 L. J. C. P. 91; Judson on Interstate Commerce, pars. 148, 149; Western Union Tel. Co. v. Call Pub. Co., 181 U. S. 92, 21 Sup. Ct. 361, 45 L. ed. 765; I. C. C. v. Detroit, Grand Haven & Milwaukee R. Co., 167 U. S. 633, 17 Sup. Ct. 986, 42 L. Ed. 306. (3) Weight, bulk and convenience of transportation. (4) The amount of the product or the commodity in the hands of a few persons to ship or compete for, recognizing the principle of selling cheaper at wholesale than at retail. I. C. C. v. B. & O. Ry. Co., 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699. (5) General

public good, including good to the shipper the railroad company and the different localities. The I. C. C. v. B. & O. Ry. Co., 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699. (6) Competition, which the authorities as well as the experts, in their testimony in these cases, recognize as a very important factor. * * * None of the above factors alone are considered necessarily controlling by the authorities. Neither are they all controlling as a matter of law. It is a question of fact to be decided by the proper tribunal in each case as to what is controlling."

I. C. C. v. Chicago Gw. R. Co. 141 Fed. 1003-1015.

Aff: 209 U. S. 108, 52 L. ed. 705, 28 Sup. Ct. 493.

This being true, it is absurd, it seems to us, for the defendants to point to one rate comparison as conclusive and controlling in the present cases and thus attempt to exclude all other factors. It must be recognized that the Commission in *Docket 16742* had many factors before it in making its decision, including the following: (1) the amount of haul, (2) a comparison with the Memphis-Southwestern and the Consolidated Southwestern rates, (3) the consumption of sugar in the territory involved, (4) the 4th Section of the Transportation Act, (5) the change in sugar shipping conditions, and finally (6) general transportation conditions from California to Arizona. The report and findings of the Commission being before the court as *prima facie* evidence, these matters were therefore also before the court for consideration.

In addition the Commission has said that the mere fact that rates appear out of line with other rates to which they are closely related is not of itself sufficient to afford a basis for finding of reasonableness or unreasonableness.

City Coal Co. v. New York, 123 I. C. C. 609;
Dallas Paper Co. v. T. & N. R. Co., 132 I. C. C. 59;
Peabody Lbr. Co. v. Penn. R. Co., 132 I. C. C. 741.

The Commission has also said in considering the comparison of *per ton per mile* revenue of rates (as defendants attempted to do here, R. 202), such method of testing freight rates cannot be taken as a controlling rule in determining the reasonableness of rates.

2 I. C. C. 52
23 I. C. C. 519
40 I. C. C. 195
47 I. C. C. 44
81 I. C. C. 552.

In the case of *Railway Express Agency v. United States,* 6 Fed. Supp. 249, the court said it would not set aside Interstate Commerce Commission findings that certain rates were reasonable on the ground that such findings were inconsistent with findings made in other procedings before the Commission.

All of Defendants' argument on this point is to the effect that the Commission having fixed the rates to Phoenix, Globe, and Clarkdale, and the Supreme Court and this Court having held that reparation could not be allowed to these points, that it follows that reparations could not be allowed to other points in the state, although the rates to such points had never been prescribed by the Commission. The defendants even work themselves up by the sophistry of their own argument to declare, on page 98 of their Brief, that the Commission by prescribing the reasonableness of the rates to Globe and Phoenix

also thereby prescribed the reasonableness of all rates in Arizona on sugar, and therefore under the *Arizona Grocery Case* and the *Wholesale Grocery Case* reparation cannot be allowed to any other points in Arizona, notwithstanding the fact such other rates were carrier-made; and also notwithstanding the fact that such other points of destination had never had their day before the Commission on the question of the reasonableness of their rates. Such reasoning is absurd. The effect of sustaining such argument would be equivalent to saying that whenever the Commission fixes a rate to one point the rates to all other points, at least in that particular state, are also conclusively fixed, although such other points had not been present or represented in such hearing. What a travesty on justice—that rights could be taken away in this fashion without an opportunity to be heard.

The defendants in the same vein argue to this court that while the findings of the Commission are merely *prima facie,* the rates to Globe, Clarkdale, and Phoenix, are conclusive, and therefore such rates must prevail over the *prima facie* character of the findings. This statement is wholly unfounded. The rates only to these places named were conclusive; but the rates to Tucson, the point here involved (and most of the other points in this state) had not been fixed conclusively, and the showing of the defendants had no such effect as to override the *prima facie* character of the findings.

If we analyze defendants' theory of comparing rates in effect to Phoenix with rates to Tucson, we find sufficient reasons for the trial court not accepting such comparisons

as overcoming the *prima facie* effect of the findings and orders in *Docket 16742* and associated cases.

In making a comparison with Phoenix, the defendants take as the rate 96½c to this point (Defendants' Exhibit "F", R. 202). As a matter of fact, this rate was only in effect to Phoenix from July 1921 to July 1, 1922, when it was reduced to 86½c as a result of the reduced rates of 1922, and again reduced to 84c in 1923; and as a result of *Docket 14449*, (Second Phoenix Case), *95 ICC, 244*, the reasonable rate to Phoenix was fixed at 71c, effective February 25, 1925. (Record of rates to Phoenix see history in decision of this court, Arizona Grocery Company case 49 Fed. (2), 563. Also evidence of defendant's witness Fielding on cross examination, R. 212-215). None of the shipments here in question moved during the period when the 96½c rate was in effect to Phoenix, some moved during the period the rate to Phoenix was 84c, and *a substantial part moved after the rate to Phoenix had been reduced to 71c*, (Plaintiffs' Exhibit "B", R. 37, and Plaintiffs' Exhibit "A", R. 49 and 50). This fact alone would indicate the unreasonableness of the rates to Tucson. The rates prescribed by the Commission as reasonable on these shipments for the reparation period were 73c and 77c (R. 37, and 49 and 50; and R. 25 and 26).

The defendants' witness J. L. Fielding admitted that Defendants' Exhibit "F" did not show rates actually charged to Phoenix, but only the maximum rate prescribed in the *First Phoenix Case* in 1921.

It is therefore clear that when the rates actually charged to Phoenix are compared with rates prescribed by the

Commission as reasonable to Tucson for the reparation period, the trial court was justified in its finding of unreasonableness of the rates charged plaintiff.

In addition the Interstate Commerce Commission itself found that the 96½c rate to Phoenix was based on an insufficient and incomprehensive record (*Docket 16742,* R. 25). In fact it is well to review exactly what the Commission said in this regard:

> "For the first time the record before us is comprehensive in the evidence which it contains bearing upon the reasonableness of the rates assailed." (R. 25.)

This court and the Supreme Court has held that even though the Commission did prescribe the maximum rate of 96½c to Phoenix on such an incomplete record, it could not later ignore the rate so prescribed and allow reparation on a lesser rate to Phoenix. This holding, however, does not destroy the effect of the statement of the Commission in this regard when the reasonableness of rates to other points are being compared with a rate so improperly fixed.

Surely no one can logically or fairly argue that such a rate so made (i. e. on an incomprehensive and insufficient record) should have been taken by the trial court as conclusive in determining the reasonableness of rates to other points. The *First Phoenix Case* shows all that was done was to give Phoenix main line rates; that no attempt was made to pass on main line rates or on rates to other points in Arizona (R. 145, 146).

The record in the *Second* and *Third Cases* shows clearly that the Commission recognized that an unreasonably high

maximum rate was prescribed in the *First Phoenix Case.* This must be considered, regardless of the fact that such rate had to be taken as conclusively just and reasonable to Phoenix for the purpose of disallowing reparation to such point.

The maximum rate of 96½c to Phoenix having been prescribed by the Commission on an incomprehensive and insufficient record, resulted in an injustice to Phoenix shippers, who were thereby prohibited from recovering reparation. The rates to Tucson not being commission-made during the period of these shipments, there is no reason, either in law or in equity, why the rights of the plaintiffs should be restricted or concluded by the injustice of the Phoenix situation. The wrongs to them should be corrected. The Commission having found the rates to Tucson unreasonable, the carriers cannot complain in being compelled to repay the overcharges, for they are only entitled to reasonable rates.

In this connection we would call the court's attention to the fact that the defendant carriers did not introduce in the trial of the present cases the evidence which was introduced before the Commission in *Docket 16742.* In the absence of this evidence the following rule is applicable:

> "The settled rule is that the findings of the Commission may not be assailed upon appeal in the absence of the evidence upon which they were made. Spiller v. Atchison, T. & S. F. R. Co. 253 U. S. 117, 125, 64 L. ed. 810, 817, 40 S. Ct. 466; Louisiana & P. B. R. Co. v. United States, 257 U. S. 114, 116, 66 L. ed. 156, 158, 42 S. Ct. 25; Nashville C. & St. L. R. Co. v. Tennessee, 262 U. S. 318, 324, 67 L. ed. 999, 1003, 43

S. Ct. 583; Edward Hines Yellow Pine Trustees v. United States, 263 U. S. 143, 148, 68 L. ed. 216, 220, 44 S. Ct. 72; Chicago, I. & L. R. Co. v. United States, 270 U. S. 287, 295, 70 L. ed. 590, 595, 46 S. Ct. 226.

The appelant did not free itself of this restriction by submitting additional evidence in the form of affidavits by its officers. For all that we can know, the evidence received by the Commission overbore these affidavits or stripped them of significance. The findings in the report being thus accepted as true, there is left only the inquiry whether they give support to the conclusion. Quite manifestly they do."

Mississippi Valley Barge L. Co. v. United States, decided April 30, 1934; 290 U. S. .....; 78 L. ed. .....

The defendants cite as authority for this court reversing the finding of the lower court on the question of fact as to unreasonableness, the case of *Southern Ry. Co. v. Eichler,* 56 Fed. (2) 1010.

When we remember that the question of reasonableness is a question of fact, not law (this has previously been shown by ample and undisputed authority), we find that this case is no authority for the position of defendants. In the case cited the Appellate Court was reviewing a question of law, which is always open to review. This is clearly shown by the following excerpt from the opinion in that case:

"In this view, the question at issue resolved itself in *one of law,* requiring the construction of a tariff."

"What construction shall be given to a railroad tariff presents ordinarily a question of law."

After all, the situation here presented is simply that con-

siderable evidence was introduced before the lower court, some documentary, some by oral and documentary testimony of expert witnesses, substantiating the plaintiffs' case. Upon this evidence the court made its findings, which should not be here disturbed. See authorities *supra*, also the following:

> "The only question with which this court can be concerned upon review is whether there was any substantial evidence to support the findings of the trial court."
>
> *Kurecki v. Buck*, 71 Fed. (2), 227, 229.

This court recently decided the case of *U. S. v. Alger*, 68 Fed. (2), 592, 593. In this case the court said:

> "The record discloses some conflict in the opinions of the expert witnesses, but such disagreement, together with the weight to be given the opinion and evidence, were all for the consideration of the jury."

It has been otherwise stated:

> "It is not within our province to usurp the authority of that court by substituting our judgment for its judgment in the ascertainment of facts when the evidence supports such findings."
>
> *So. Ry. Co. v. Blue Ridge Power Co.*, 30 Fed. (2), 33, 40.

This court has also said:

> "We do not weigh the evidence; what our verdict would have been as jurymen is immaterial."
>
> *United States v. Dudley*, 64 Fed. (2), 743, (9th C. C. A. decided April 1933).

The same holds true where the matter has been tried to the court.

Appellate courts will not disturb findings of fact where the evidence is conflicting.

Mitchel Coal & Coke Co. v. P. R. Co., 230 U. S. 247, at 256.

Applying these rules, it is clear that the findings of fact of the District Court on the question of the unreasonableness of the rates charged plaintiffs should not be disturbed.

3. The question of discrimination is not properly before this court, and in any event is not an issue that can be raised by defendants.

Defendants in this court raise the issue that to sustain the awards of reparations granted plaintiffs would result in unlawful discrimination. (Beginning on page 81, Appellants' Brief.) This issue was not presented to the Trial Court. No mention of discrimination is made in either plaintiffs' complaint (R. 3 and 42) or in defendants' answers (R. 58 and 62). What constitutes discrimination is a question of fact.

I. C. C. v. So. Pac. Co., et al, 123 Fed. 597, 601.

Tex. & Pac. Ry. Co. v. I. C. C., 162 U. S. 197, 220; 40 L. ed. 940, 946;

I. C. C. v. Ala. Midland Ry. Co., 108 U. S. 144, 170; 42 L. ed. 414.

Therefore, to have raised this question it should have been pleaded. Defendants did not ask for a finding of fact by the trial court upon the question of discrimination (R. 236-249).

No mention is made of the question of discrimination in defendants' Assignments of Error. (R. 276-315). This question cannot therefore be raised in this court for the first time, and it is therefore not open for consideration in this appeal.

Louie Share Gan v. White, 258 Fed. 798 (C. C. A. 9th);
Wight, et al. v. Washoe County, 251 Fed. 819 (C. C. A. 9th);
Behn, Meyer Co. v. Campbell, et al., 205 U. S. 403; 51 L. ed. 857.

There is another reason why this issue of discrimination cannot be considered in these cases. The Supreme Court has stated that the question of prejudice and discrimination is not one that can be raised by the defendant carriers. In the case of *Interstate Commerce Commission v. Chicago, R. I. and P. Ry. Co. et al.,* 218 U. S. 88, the carriers were attacking an order of the Commission on the basis that it was discriminatory; just as the defendants are here attacking the present orders. To this the court answered, at page 108:

> "That the companies (railroads) may complain of the reduction made by the Commission so far as it affects their revenues is one thing. *To complain of it as it may affect shippers or trade centers is another. We have said several times that we will not listen to a party who complains of a grievance which is not his.* Clark v. K. C., 176 U. S. 114, 118; 44 L. ed. 392, 396; Smiley v. Kansas, 196 U. S. 447; 49 L. ed. 546." (Emphasis supplied.)

It must be remembered that other shippers and localities in Arizona are not complaining about discrimination or prejudice. There is no objection on their part to the defendants complying with the orders of the Commission and paying these plaintiffs. Until the question of discrimination and prejudice is raised by these shippers and the localities themselves, it is no concern of the defendants.

At no place in the brief of the defendants is any contention made that the rates in question are confiscatory. No attempt is made to show that the rates allowed by the Commission would result in confiscation of the property of the defendant. Without this we believe that the entire force of their argument falls.

In addition to the foregoing conclusive reasons why the issue of discrimination should not be considered here, the following facts show this contention is improper: At the same time these cases now on appeal were being tried in the District Court, there were several others also being heard involving reparation orders on shipments of sugar to Prescott, Kingman, Williams, Flagstaff, Holbrook, and Yuma, Arizona. All of these reparation orders arose out of, and were based on, the findings in *Docket 16742*. Judgments were entered by the District Court in each of these cases in favor of the plaintiffs, i. e. sustaining the awards, just as judgments were entered in the present cases. The evidence introduced was essentially the same in all of the present cases then being tried, except as to the particular shipments to the various points and the specific awards of reparation thereon. Notwithstanding all that has been argued by the defendants in the present cases on appeal, the

carriers satisfied these judgments, i. e. paid the reparations to the points above mentioned.

Appendix "A" appearing at the conclusion of this brief shows, (1) the approximate location of the points at which the carriers have already paid the reparations, (2) the rates found reasonable to these points for reparation purposes, and (3) the points here concerned, together with rates found reasonable for reparation purposes. The seven points at which the awards have been paid are underlined in red, the point here involved is underlined in green.

As the carriers have already paid the reparation awarded to complainants at these several points, it irresistibly follows that their argument that unjust discrimination and undue prejudice would result if the awards here on review were ordered paid, is obviously untenable. Just the reverse is true.

4. No error occurred in the introduction of evidence before the Trial Court.

Defendants base their objection to the introduction of the testimony of witness Rief and plaintiffs' Exhibit No. 5, on four grounds: (1) the exhibit was not prepared by witness Rief; (2) this evidence was not proper rebuttal, and was cumulative; (3) the exhibit contained certain additions and omissions as to the destinations, rates, and distances involved; and (4) this evidence was contradicted by certain other evidence. (Defendants' Brief, pp. 89, 90). We shall deal with them in this order.

(1) As to the exhibit not being prepared by the witness, the record discloses that he checked the exhibit to see

that it was correct, and helped to a certain extent in its preparation (R. 223). We believe this ample and sufficient to justify its acceptance by the court. Clearly the test in such cases is that the witness testify that the exhibit is correct. Mere preparation by the witness would not signify that it was correct. Here Rief testified that he had checked the exhibit before its introduction and found it correct, and in addition had helped in its preparation.

(2) As to the argument that the exhibit is cumulative and not proper rebuttal, the defendants cite *Section 3807, Revised States of Arizona, 1928,* which deals with the order of trial by jury. The same order is generally followed in cases tried by the court, but the rules are greatly relaxed as to the introduction of evidence. In addition, the next section of the Arizona Code following the one cited by defendants, *Section 3808,* provides for reopening cases at the discretion of the trial court. In the case of *De Mund v. Benson, 265 Pac. 84,* the Supreme Court of Arizona stated that the trial court has wide discretion in such matters. This is the universal rule. In fact, it is clearly stated in another authority cited by defendants, *24 California Jurisprudence.* On page 764 of this work it says:

> "The admission of testimony out of its proper order is a matter resting in the discretion of the court, and in the absence of manifest abuse of that discretion, the ruling will not be disturbed on appeal." (Page 765.)
>
> "The order of proof must be regulated by the sound discretion of the court. Such discretion will not be interfered with by a reviewing court unless it has been

abused to the substantial detriment of the party complaining." (Page 764.)

Defendants failed to point out how there had been any "substantial detriment" to them by the introduction of this testimony in the manner permitted by the trial court.

(3) As to the third ground, that the exhibit contained certain additions and omissions, this would be unsound, even if true. Such complaint would go to its evidentary value, not its competency. In other words, the court could consider these facts in valuing its weight. However, it is incorrect to say there were any improper additions or omissions in the exhibit. The witness Rief testified what the exhibit purported to show (R. 218), and in that regard it was complete (R. 220-221). If the defendants felt there were other matters to be considered not shown in the exhibit, they were at liberty to call them to the court's attention. A similar situation existed as to defendants' Exhibit "F", (R. 202). On cross examination defendants' witness Fielding admitted that it did not contain certain facts pertaining to the rates on sugar to Phoenix (R. 215). However, the court correctly admitted the exhibit for what it purported to be, and for what it was worth. Again, as shown later in this brief, the matter being tried to the court without a jury, the court possessed wide discretion in passing upon the question of competency of the evidence.

(4) As to the fourth ground, that the testimony and exhibit were contradicted by certain other evidence, it is to be noted that no authority is cited by defendants on the point. The fact that certain testimony is contradicted by other testimony does not make it incompetent. The

weight of the evidence and the credibility of the witnesses is a question to be passed upon by the court in deciding the issues presented. Cyc. on Fed. Procedure, vol. 2, p. 709. If the rule insisted upon here by defendants were applied, a large part of defendants' own testimony should be stricken because it conflicts with testimony of the plaintiff. No such rule, of course, exists.

Finally, this point should have little or no weight. The cases having been tried to court without a jury, strict rules of evidence do not apply. The erroneous admission of evidence in cases tried by a court sitting without a jury is not grounds for reversal. *Chicago B. & L. Co. v. City of Pittsburgh,* 271 Fed. 678. In an opinion recently written by Judge Sawtelle, this court held that the presumption on appeal is that any testimony erroneously admitted by a chancellor was disregarded.

National Res. Ins. Co. v. Scudder, 71 Fed. (2), 884.

The general rule is that judgment rendered after trial by a court without a jury will not be reversed for admission of incompetent evidence, where there is sufficient competent evidence to sustain the finding.

South Fork Brewing Co. v. United States, 1 Fed. (2), 167, cert. den. 266 U. S. 626, 69 L. ed. 475;

Cascaden v. Bell, 257 Fed. 926;

Lackner v. McKechney, 2 Fed. (2), 516, cert. den. 267 U. S. 601; 69 L. Ed. 808;

Hall v. United States, 267 Fed. 795;

Gardner v. United States, 71 Fed. (2), 63 (9th C. C. of A.).

There can be no doubt that the findings and report in *Docket 16742* are sufficient evidence alone upon which to sustain the findings and decisions of the District Court.

CONCLUSION.

As stated in the foreword to our argument, there are only two principal questions presented to this court by the defendants in their Assignments of Error and Argument. These two questions are:

1. Were the awards of reparation in favor of plaintiffs jurisdictionally made by the Interstate Commerce Commission; and

2. Is the finding of unreasonableness made by the District Court as to the rates charged plaintiffs, supported by substantial evidence?

If the court decides these two questions in the affirmative, then the judgments of the Trial Court should be affirmed, and all of the errors asserted by defendants in the brief (pp. 11-14) will be disposed of, with the possible exception of No. 7, pertaining to the reasonableness of attorneys' fees allowed plaintiff by the Trial Court.

However, this matter of attorneys' fees was not urged by defendants in their argument. We take it, therefore, under the holdings of this court, that this assignment will not be considered. In addition there was ample testimony to support the finding of the Trial Court on this point (R. 225-230). The allowance of attorneys' fees is provided for by the Interstate Commerce Act, Section 16 (2), *49 U. S. C. A. 16 (2)*.

We believe the authorities cited, together with the reasons set forth in this brief, sustain in every detail the judgments of the Trial Court. We ask this court, therefore, to affirm the decisions of the District Court.

Respectfully submitted,

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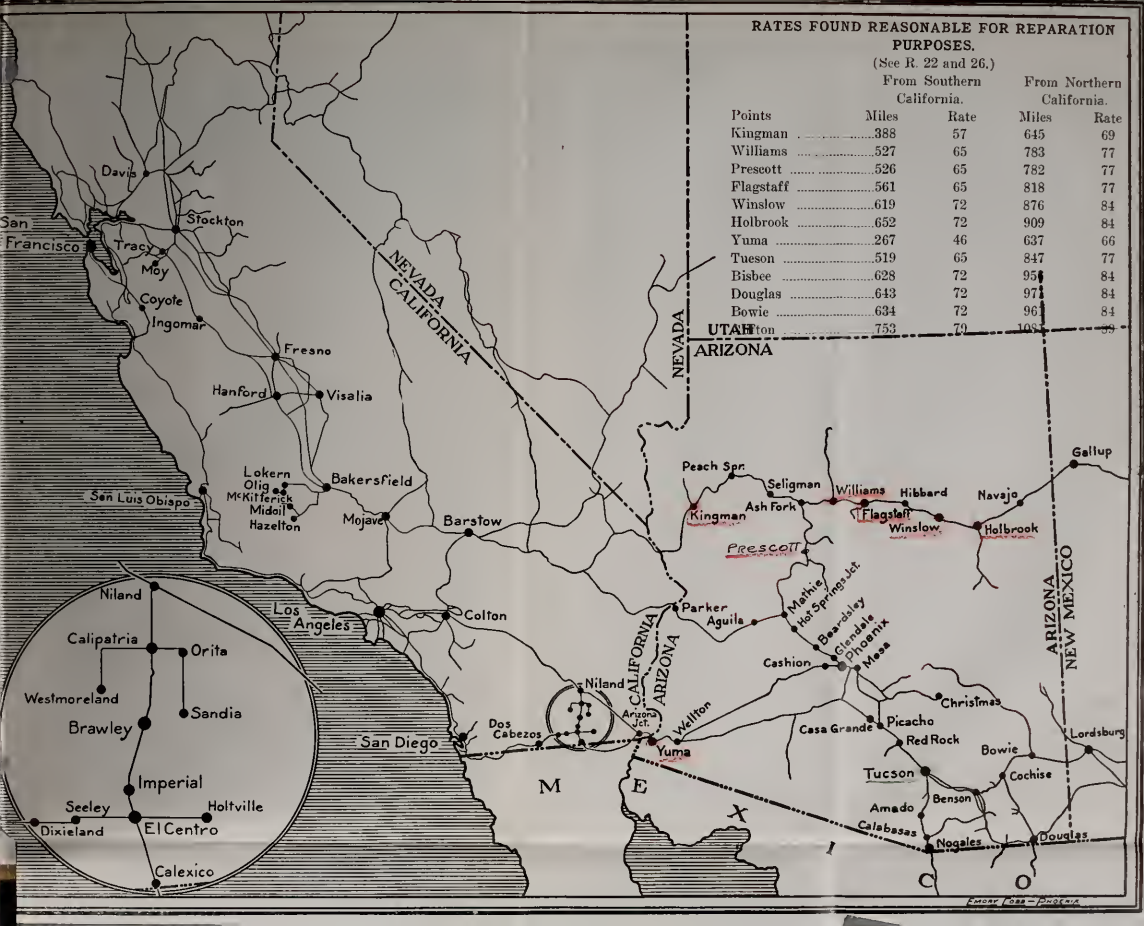
Dated, Phoenix, Arizona,
October 29, 1934.

Appendix


RATES FOUND REASONABLE FOR REPARATION PURPOSES.
(See R. 22 and 26.)
From Southern California.
From Northern California.
Points | Miles | Rate | Miles | Rate
Kingman | 388 | 57 | 645 | 69
Williams | 527 | 65 | 783 | 77
Prescott | 526 | 65 | 782 | 77
Flagstaff | 561 | 65 | 818 | 77
Winslow | 619 | 72 | 876 | 84
Holbrook | 652 | 72 | 909 | 84
Yuma | 267 | 46 | 637 | 66
Tueson | 519 | 65 | 847 | 77
Bisbee | 628 | 72 | 956 | 84
Douglas | 643 | 72 | 971 | 84
Bowie | 634 | 72 | 961 | 84
Clifton | 753 | 79 | 1081 | 99
NEVADA
CALIFORNIA
UTAH
ARIZONA
NEVADA
CALIFORNIA
ARIZONA
NEW MEXICO
ARIZONA
MEXICO
Davis
Stockton
San Francisco
Tracy
Moy
Coyote
Ingomar
Fresno
Hanford
Visalia
Lokern
Olig
McKitterick
Midoil
Hazelton
Bakersfield
San Luis Obispo
Mojave
Barstow
Los Angeles
Colton
San Diego
Dos Cabezos
Niland
Calipatria
Orita
Westmoreland
Sandia
Brawley
Imperial
Seeley
Holtville
Dixieland
El Centro
Calexico
Niland
Ariz. Jct.
Wellton
Yuma
Parker
Aguila
Cashion
Mathie
Hot Springs Jct.
Beardsley
Glendale
Phoenix
Mesa
Peach Spr.
Seligman
Kingman
Ash Fork
Williams
Hibbard
Flagstaff
Winslow
Navajo
Holbrook
Gallup
Prescott
Christmas
Casa Grande
Picacho
Red Rock
Tucson
Bowie
Cochise
Lordsburg
Benson
Amado
Calabasas
Nogales
Douglas
EMORY COBB—PHOENIX